No. 22-

IN THE
Supreme Court of the United States

FLAGSTAR BANK, FSB,

Petitioner,

v.

WILLIAM KIVETT, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The National Bank Act grants federally chartered banks both express and incidental powers. Those powers include the express authority to engage in real estate lending and the incidental power to administer associated escrow accounts used to pay real estate taxes, insurance, and similar fees. The Ninth Circuit has held that state laws that require banks to pay interest on funds held in mortgage escrow accounts, like California Civil Code § 2954.8(a), do not significantly interfere with those federally endowed powers and are not preempted. The Second Circuit has reached the opposite conclusion. The question presented is as follows:

Whether the National Bank Act preempts state laws that, like California Civil Code § 2954.8(a), attempt to set the terms on which federally chartered banks may offer mortgage escrow accounts authorized by federal law.

PARTIES TO THE PROCEEDING

Petitioner in this Court is Flagstar Bank, FSB, a federally chartered savings bank, appellant in the Ninth Circuit and defendant in this action.

Respondents in this Court are William Kivett, Bernard Bravo, and Lisa Bravo, as representatives of a certified class of borrowers (n. 1, *infra*), appellees in the Ninth Circuit and plaintiffs in this action.

RULE 29.6 DISCLOSURE STATEMENT

Petitioner Flagstar Bank, FSB, a federally chartered savings bank, is wholly owned by Flagstar Bancorp Inc., a publicly traded entity incorporated and validly existing under the laws of the State of Michigan. According to schedules filed with the Securities and Exchange Commission, BlackRock, Inc., and The Vanguard Group are holders of 10% or more of the stock of Flagstar Bancorp Inc., and are therefore indirect holders of an equity interest of 10% or more in Flagstar Bank, FSB.

RELATED PROCEEDINGS

This case arises from and relates to the following proceedings in the United States Court of Appeals for the Ninth Circuit and the United States District Court for the Northern District of California:

- *Kivett v. Flagstar Bank, FSB*, No. 21-15667 (9th Cir. May 17, 2022).
- *Kivett v. Flagstar Bank, FSB*, No. 18-cv-5131 (N.D. Cal. Dec. 10, 2020).
- *Smith v. Flagstar Bank, FSB*, No. 18-cv-2350 (N.D. Cal. Aug. 21, 2018).

There are no other proceedings in state or federal trial or appellate courts directly related to this case under this Court's Rule 14.1(b)(iii).

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INTRODUCTION

This case concerns the limits on a State's ability to infringe upon a federally chartered bank's federal banking powers. Federal law authorizes national banks organized under the laws of the United States to engage in real estate lending and to provide, establish, and service escrow accounts for their mortgage loans. Federal law governs various aspects of those accounts, but does not require banks to pay interest on the funds held in them. The laws of twelve States, including California and New York, do.

As amended in 2010, the National Bank Act expressly preempts any state law that "prevents or significantly interferes with the exercise by the national bank of its powers" as this Court articulated that standard in *Barnett Bank of Marion County, N.A. v. Nelson*, 517 U.S. 25 (1996). 12 U.S.C. § 25b(b)(1)(B). The Court has explained that, under that preemption standard, national banking powers are "not normally limited by, but rather ordinarily pre-empt[], contrary state law." *Barnett Bank*, 517 U.S. at 32. "States can exercise no control over national banks, nor in any wise affect their operation, except in so far as Congress may see proper to permit." *Watters v. Wachovia Bank, N.A.*, 550 U.S. 1, 11 (2007) (brackets and citation omitted).

The Ninth Circuit has held that California's law requiring that banks pay a minimum 2% interest on escrow accounts is not preempted, reasoning that only state interest-on-escrow laws that impose punitively high interest rates would fail this Court's preemption

test. The Second Circuit has expressly disagreed, finding New York's 2% interest-on-escrow law preempted for national banks and holding that any state law that attempts to control the exercise of national banks' federal banking powers without congressional approval is preempted under Section 25b(b)(1)(B). The Second Circuit's approach aligns with—and the Ninth Circuit's approach conflicts with—decisions from the First, Sixth, and Eighth Circuits, as well as the California Supreme Court, considering similar state laws. The Second Circuit's approach is also supported by this Court's precedent on national banking preemption and the longstanding view of the federal government's primary regulator of national banks, the Office of the Comptroller of the Currency (OCC).

This square, acknowledged conflict presents a question of exceptional importance for the national banking system. The OCC agrees. As recently as June 2021, the OCC declared that the standard for preemption under Section 25b(b)(1)(B), including its application to state interest-on-escrow laws, "is a matter of foundational consequence" to the national banking system. And by deciding that California Civil Code § 2954.8(a) was not preempted, the OCC emphasized, the Ninth Circuit had misconstrued the NBA and "introduce[d] significant uncertainty in a vital area of law." This case presents an ideal vehicle for considering this question and resolving the uncertainty the Ninth Circuit's mistaken interpretation creates. The petition for a writ of certiorari should be granted.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1-5) is unreported but is available at 2022 WL 1553266. The opinion and order of the district court granting respondents' motions for class certification and to amend the complaint (App., *infra*, 6-25) is reported at 333 F.R.D. 500. The order of the district court granting respondents' motion for summary judgment as to liability (App., *infra*, 26-27) is unpublished. The opinion and order of the district court granting respondents' motion for summary judgment as to restitution and injunctive relief (App., *infra*, 28-72) is reported at 506 F. Supp. 3d 749.

JURISDICTION

The judgment of the court of appeals was entered on May 17, 2022. A timely petition for rehearing en banc was denied on July 14, 2022 (App., *infra*, 75-76). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

The relevant constitutional, statutory, and regulatory provisions are reproduced in the appendix, *infra*, 103-22.

STATEMENT OF THE CASE

A. Legal Background

1. Congress enacted the National Bank Act (NBA), 12 U.S.C. § 1 *et seq.*, in 1864 to establish an independent, uniform national banking system insulated from intrusive state regulation. *See Watters*, 550 U.S. at 13-14 (observing that Congress designed the NBA to avoid "[d]iverse and duplicative" state regulation of national banking activities); *Beneficial Nat'l Bank v. Anderson*, 539 U.S. 1, 10 (2003) (noting that the national banking system "needed protection from 'possible unfriendly State legislation'"); *Talbott v. Bd. of Comm'rs*, 139 U.S. 438, 443 (1891) ("[T]he character of the system implies an intent to create a national banking system . . . with uniform operation.").

Under the NBA, federally chartered banks operate as "instrumentalit[ies] of the federal government, created for a public purpose, and . . . subject to the paramount authority of the United States." *Davis v. Elmira Sav. Bank*, 161 U.S. 275, 283 (1896). A federal agency, the OCC, is charged "with assuring the safety and soundness of, and compliance with laws and regulations, fair access to financial services, and fair treatment of customers by" national banks. 12 U.S.C. § 1(a).

The NBA "vest[s] in nationally chartered banks enumerated powers and 'all such incidental powers as shall be necessary to carry on the business of banking.'" *Watters*, 550 U.S. at 11 (quoting 12 U.S.C. § 24 Seventh). Among those enumerated powers is the au-

thority to "make, arrange, purchase or sell loans or extensions of credit secured by liens on interest in real estate." 12 U.S.C. § 371(a); *see id.* § 1464(c)(1)(B) (granting same real estate lending power to federally chartered savings associations). OCC guidance confirms that national banks also possess the incidental power to provide, establish, and service associated mortgage escrow accounts. OCC Interp. Ltr. 1041, 2005 WL 3629258, at *2 (Sept. 28, 2005); *see NationsBank of N. Carolina, N.A. v. Variable Annuity Life Ins. Co.*, 513 U.S. 251, 258 n.2 (1995) ("[T]he 'business of banking' is not limited to the enumerated powers in § 24 Seventh.").

Escrow accounts established as part of a residential mortgage loan operate as an important risk-mitigation tool for lenders and borrowers. These familiar accounts permit lenders to collect, and borrowers to pay, money to fund the amounts that borrowers will periodically owe in property taxes, insurance premiums, and other charges related to the property. Lenders then use the escrowed funds to directly pay those charges when due, avoiding issues like tax liens and lapses in insurance coverage on the property.

The Real Estate Settlement Procedures Act of 1974 (RESPA), 12 U.S.C. § 2601 *et seq.*, generally governs the administration of mortgage escrow accounts. *See* 12 U.S.C. §§ 2605, 2609. Among other requirements, RESPA requires lenders to make timely payments from escrow accounts when charges become due and to promptly return any escrowed funds after a mortgage is paid off. *See id.* § 2605(g). The law imposes a

cap on the amount that a lender may require a borrower to deposit in any escrow account each month. *See id.* § 2609(a). And it requires lenders to provide borrowers certain statements and notifications about the balance of escrow accounts and the charges the account is intended to cover. *See id.* § 2609(b)-(c). RESPA does not require lenders to pay borrowers interest on money held in mortgage escrow accounts.

2. More than "200 years ago, in *McCulloch v. Maryland*, 4 Wheat. 316 (1819), this Court held federal law supreme over state law with respect to national banking." *Watters*, 550 U.S. at 10. The NBA's grants of authority, both enumerated and incidental, are "not normally limited by, but rather ordinarily pre-empt[] contrary state law." *Barnett Bank*, 517 U.S. at 32. This preemptive scope stems from "the view that normally Congress would not want States to forbid, or to impair significantly, the exercise of a power that Congress explicitly granted." *Id.* at 33. When "Congress has not expressly conditioned the grant of 'power' upon a grant of state permission," that power is generally not subject "to local restriction." *Id.* at 34.

In *Barnett Bank*, this Court thus explained that States may only regulate national banks where "doing so does not prevent or significantly interfere with the national bank's exercise of its powers." 517 U.S. at 34. As the Court elaborated in *Watters*, under that standard, national banks "are subject to state laws of general application in their daily business to the extent such laws do not conflict with the letter or the general purposes of the NBA." 550 U.S. at 11. But "the States can exercise no control over national banks, nor in any

wise affect their operation, except in so far as Congress may see proper to permit." *Id.* (brackets and citation omitted).

3. Congress codified this preemption standard in the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010). Dodd-Frank provides that "[s]tate consumer financial laws are preempted" if, "in accordance with the legal standard for preemption in the decision of [this Court] in Barnett Bank of Marion County, N.A. v. Nelson, Florida Insurance Commissioner, et al., 517 U.S. 25 (1996), the [s]tate consumer financial law prevents or significantly interferes with the exercise by the national bank of its powers." *Id.* § 1044(b), 124 Stat. at 2015 (codified at 12 U.S.C. § 25b(b)(1)(B)). The statute also confirms that preemption determinations "may be made by a court, or by regulation or order of the Comptroller of the Currency on a case-by-case basis, in accordance with applicable law." *Id.* Under Dodd-Frank, this preemption standard applies to all federally chartered banks, including federal savings banks like Flagstar. *See* 12 U.S.C. § 25b(a)(1), (b)(1)(B) (defining "national banks" to include "any bank organized under the laws of the United States" and applying *Barnett Bank* preemption standard to all national banks); 12 U.S.C. § 1464(a) (giving the OCC authority to provide for organization of and issue charters to federal savings banks).

Dodd-Frank further clarified that the OCC's preemption determinations are entitled to *Skidmore* deference. *See* 12 U.S.C. § 25b(b)(5)(A) (instructing courts to "assess the validity of such determinations,

depending upon the thoroughness evident in the consideration of the agency, the validity of the reasoning of the agency, the consistency with other valid determinations made by the agency, and other factors which the court finds persuasive and relevant to its decision"). Nothing in Dodd-Frank, however, "affect[s] the deference that a court may afford to the Comptroller in making determinations regarding the meaning or interpretation" of the NBA. 12 U.S.C. § 25b(b)(5)(B); *see NationsBank*, 513 U.S. at 258 n.2.

After Dodd-Frank's enactment, the OCC reaffirmed its longstanding view, articulated in regulations first enacted in 2004, that federally chartered banks may exercise their real estate lending powers "without regard to state law limitations concerning . . . [t]he ability of a creditor to require or obtain . . . risk mitigants, . . . [t]he terms of credit [and] . . . [e]scrow accounts." 12 C.F.R. § 34.4(a)(2), (a)(4), (a)(6); *see* Office of Thrift Supervision Integration and Dodd-Frank Act Implementation, 76 Fed. Reg. 43,549, 43,557 (July 21, 2011) (concluding that state escrow laws "would meaningfully interfere with fundamental and substantial elements of the business of national banks").

4. Finally, Dodd-Frank also amended the Truth in Lending Act (TILA), 15 U.S.C. § 1601 *et seq.*, to require that creditors—whether state banks, federally chartered banks, or other lenders—establish escrow accounts for certain higher-priced mortgage loans. *See* 15 U.S.C. § 1639d(a)-(b). TILA's Section 1639d thus ensures that borrowers with weaker-than-average credit receive the protection escrow accounts provide.

Section 1639d further provides that a creditor required to establish an escrow account under that provision must pay interest on the amount held in the account, "[i]f prescribed by applicable State or Federal Law," "in the manner as prescribed by that applicable State or Federal law." 15 U.S.C. § 1639d(g)(3). Where TILA does not require an escrow account, the provision confirms that creditors and borrowers may still agree to establish such accounts "on terms mutually agreeable to the parties to the loan" or "at the discretion of the lender or servicer, as provided by the contract between the lender or servicer and the borrower." *Id.* § 1639d(f)(1)-(2).

B. The Present Controversy

1. Flagstar is a federally chartered savings bank that originates, buys, sells, and services home mortgage loans. App., *infra*, 30. Like many mortgage lenders and servicers, Flagstar uses escrow accounts to reduce the risks associated with individual loans.

Flagstar did so for respondent William Kivett, to whom Flagstar loaned $400,610 to finance a 2012 real estate purchase in California. App., *infra*, 32. Under the deed of trust securing that mortgage loan, Flagstar "established and maintained an escrow account for the payment of [Kivett's] property taxes and insurance premiums and other potential charges related to the property." *Id.* at 32-33. While servicing Kivett's mortgage from 2012 to 2015, Flagstar did not pay interest on the amounts held in Kivett's escrow account. *Id.* at 30-32.

In December 2017, respondents Bernard and Lisa Bravo similarly obtained a mortgage loan (from another lender) secured by a deed of trust requiring an escrow account. App., *infra*, 34. The servicing rights to their mortgage almost immediately transferred to Flagstar. *Id.* Flagstar maintained an escrow account for the Bravos without paying interest on the funds in that account. *Id.*

2. This putative class action was filed against Flagstar by Lowell and Gina Smith, whose mortgage loan Flagstar also serviced. The Smiths alleged breach of contract and a claim under California's Unfair Competition Law (UCL), Cal. Business & Professions Code § 17200 *et seq.*, based on Flagstar's failure to pay interest on their mortgage escrow account. App., *infra*, 32. Kivett later joined as a named plaintiff, asserting only a claim under the UCL. *Id.*

California Civil Code § 2954.8(a) mandates that financial institutions pay at least 2% interest annually on escrow accounts associated with certain residential mortgage loans. The Smiths and Kivett asserted that California Civil Code § 2954.8(a) applied to Flagstar and that the company's refusal to pay interest on mortgage escrow accounts in California thus violated the UCL's prohibition on "unlawful . . . business act[s] or practice[s]." Cal. Bus. & Prof. Code § 17200.

After the district court granted summary judgment to Flagstar against the Smiths, Kivett moved for class certification and to add the Bravos as named plaintiffs. App., *infra*, 10-11. The court granted the request

to add the Bravos and certified a Rule 23(b)(3) class as to the remaining UCL claim.[1] *Id.* at 23-24.

After certification, the parties cross-moved for summary judgment, with Flagstar arguing that California Civil Code § 2954.8(a) was preempted because it significantly interferes with Flagstar's exercise of its federal powers. App., *infra*, 35. The district court rejected Flagstar's preemption argument and granted respondents' motion for summary judgment on liability, holding Flagstar liable for failing to pay interest on respondents' escrow accounts. *Id.* at 26-27; *id.* at 35-36. Respondents filed a second motion for summary judgment seeking restitution for unpaid interest and a permanent injunction requiring Flagstar to pay interest on California mortgage escrow accounts going forward. *Id.* at 36. The court granted that motion,

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[1] The certified class includes:

> All persons who at any time on or after August 22, 2014 through September 30, 2019 had mortgage loans serviced by Flagstar Bank, FSB ("Flagstar") on 1–4 unit residential properties in California and paid Flagstar money in advance to hold in escrow for the payment of taxes and assessments on the property, for insurance, or for other purposes relating to the property, but did not receive interest on the amounts held by Flagstar in their escrow accounts (excluding, however, any such persons (a) whose mortgage loans originated on or before July 21, 2010 or (b) who would be owed less than $1 in interest-on-escrow as of September 30, 2019 if plaintiffs' allegations are proven).

App., *infra*, 5, 35.

entered a permanent injunction ordering Flagstar to pay interest on funds held in escrow going forward, and awarded the class about $9 million in restitution and prejudgment interest. *Id.* at 71-72.

3. On appeal, the Ninth Circuit affirmed the district court's preemption holding based on its earlier decision in *Lusnak v. Bank of America, N.A.*, 883 F.3d 1185 (9th Cir. 2018). App., *infra*, 1-5; *see id.* at 77-102 (*Lusnak* decision).

a. In *Lusnak*, the plaintiff claimed—like respondents here—that the bank's refusal to pay interest on California mortgage escrow accounts violated the UCL. App., *infra*, 85. The district court found California Civil Code § 2954.8(a) preempted as applied to national banks, but the plaintiff appealed. *Id.* at 85.

The Ninth Circuit reversed. The court of appeals stated that, because California Civil Code § 2954.8(a) was a consumer-protection law—"a field traditionally regulated by the states"—it would require "compelling evidence of an intention to preempt." App., *infra*, 88. "[T]he operative question," it reasoned, was "whether section 2954.8(a) *prevents* Bank of America from exercising its national bank powers or *significantly interferes* with Bank of America's ability to do so." *Id.* at 94. Under that standard, as the court understood it, "[m]inor interference with federal objectives is not enough." *Id.* And, in the court's view, California Civil Code § 2954.8(a) did not impose a significant interference with the bank's ability to administer escrow accounts associated with its mortgage loans. *Id.* at 95.

In reaching that determination, the Ninth Circuit relied heavily on the 2010 addition to TILA, Section 1639d(g)(3), which requires paying interest on escrow accounts associated with higher-priced mortgages "if prescribed by applicable State law." App., *infra*, 95. Although Section 1639d did not apply to the plaintiff's escrow account, the court interpreted the provision as "express[ing] Congress's view that [state interest-on-escrow] laws would not *necessarily* prevent or significantly interfere with a national bank's operations." *Id.* (emphasis added).

The *Lusnak* court allowed that "a state law setting punitively high [interest] rates . . . may prevent or significantly interfere with a bank's ability to engage in the business of banking," thus triggering preemption. App., *infra*, 97 n.7. But without such a showing, the court appeared to view Section 1639d(g)(3) as "indicat[ing]" that state interest-on-escrow laws, in general, do not "significantly interfere with the exercise of national bank powers." *Id.* at 100. And it held that California Civil Code § 2954.8(a)'s requirement to pay a minimum 2% interest rate was not preempted. *Id.* at 101-02.

The OCC filed an amicus brief supporting the bank's petition for rehearing en banc, explaining that the panel had "fundamentally misapprehend[ed] *Barnett*." Br. of Amicus Curiae Office of the Comptroller of the Currency, *Lusnak v. Bank of America, N.A.*, No. 14-56755, 2018 WL 3702582, at *5 (Apr. 23, 2018) (2018 OCC Amicus). But the petition was denied.

b. The panel in this case held that it was bound by *Lusnak*'s holding on the preemptive scope of the NBA as applied to California Civil Code § 2954.8(a). "*Lusnak*'s language is unqualified," the court explained. App., *infra*, 3. *Lusnak* found "no legal authority establish[ing] that state [interest-on-escrow] laws prevent or significantly interfere with the exercise of national bank powers, and Congress itself, in enacting Dodd-Frank, has indicated that they do not." *Id.* at 3. The panel therefore reasoned that, under *Lusnak*, the NBA "does not preempt [California Civil Code] § 2954.8(a)" as to any national bank's activities on any record. *Id.* The court observed that, without a decision from this Court or the *en banc* Ninth Circuit "bring[ing] *Lusnak*'s holding into question," a panel of the Ninth Circuit was not free to "depart from [the] earlier panel's decision." *Id.* at 5.

The court of appeals therefore affirmed the district court's preemption holding. Respondents conceded, however, that the district court had incorrectly tolled the statute of limitations and thus misstated the restitution award and incorrectly defined the class. App., *infra*, 5. The court of appeals vacated and remanded the district court's order solely to decrease the monetary recovery by about $80,000 and to reduce the date range defining the class by about five months. *Id.*

4. The court of appeals denied Flagstar's petition for rehearing en banc, with no judge requesting a vote. App., *infra*, 75-76.

REASONS FOR GRANTING THE PETITION

The Ninth Circuit's decision in this case directly conflicts with a subsequent Second Circuit decision on an important question of national banking preemption, and rests on a view of such preemption that conflicts with those of several other Circuits and the high court of the most populous State in the Ninth Circuit itself. The Ninth Circuit's decision is also wrong. Because California Civil Code § 2954.8(a) seeks to impose state restrictions on broad national banking powers that Congress did not expressly subject to state limitations, it is preempted under Section 25b(b)(1)(B)'s codification of *Barnett Bank*. If left intact, the Ninth Circuit's contrary holding will undermine national banks' real estate lending authority and allow further diverse and intrusive state regulation that will disrupt the uniform national banking system that Congress sought to create. This case presents an ideal vehicle to correct that error. The petition for a writ of certiorari should be granted.

I. The Ninth Circuit's Decision Conflicts with Decisions from the First, Second, Sixth, and Eighth Circuits, and the California Supreme Court.

This Court's review is warranted to resolve a direct and recently acknowledged conflict among the courts of appeals on an important question of federal preemption. The Ninth Circuit's decision in *Lusnak*, which the panel followed here, directly conflicts with a Second Circuit decision on whether the NBA preempts state laws requiring national banks to pay interest on

mortgage escrow accounts. *Lusnak*'s reasoning also conflicts with the reasoning of decisions from the First, Sixth, and Eighth Circuits, as well as the California Supreme Court, considering similar preemption questions under the NBA.

A. The Ninth and Second Circuits Expressly Disagree over Preemption of State Laws Requiring Interest on Escrow Accounts.

In *Cantero v. Bank of America, N.A.*, __ F. 4th __, 2022 WL 4241359 (2d Cir. Sept. 15, 2022), the Second Circuit considered a New York law that, like California Civil Code § 2954.8(a), requires banks to pay a 2% minimum interest on mortgage escrow accounts. *Id.* at *3 (citing N.Y. GOL § 5-601). Two of the named plaintiffs—the *Hymes* plaintiffs—bought a home in New York in 2016, financed by a mortgage loan from a national bank. *Id.* The loan required the *Hymes* plaintiffs to establish an escrow account and provided that the bank was not required to pay interest on that account unless "[a]pplicable [l]aw required" it. *Id.* When the bank did not pay interest on the account, the *Hymes* plaintiffs brought a breach of contract claim, seeking to recover the interest they believed N.Y. GOL § 5-601 required Bank of America to pay. *Id.* at *3-4.

The district court refused to dismiss the *Hymes* plaintiffs' claim on preemption grounds. *See Cantero*, 2022 WL 4241359, at *4-5 (citing *Hymes v. Bank of America, N.A.*, 408 F. Supp. 3d 171 (E.D.N.Y. 2019)). The court's analysis "closely tracked the reasoning of the Ninth Circuit" in *Lusnak*. *Id.* at *5. It reasoned

that the New York law was not preempted because the "degree of interference" with bank operations was "minimal" and thus did not effect a "practical abrogation of the banking power at issue." *Id.* at *4 (quoting *Hymes*, 408 F. Supp. 3d at 195). And although TILA's Section 1639d did not apply to the plaintiffs' loan, the court found that it "evince[d] a policy judgment that there is little incompatibility between requiring mortgage lenders to maintain escrow accounts and requiring them to pay a reasonable rate of interest on [those] sums." *Id.* at *4 (quoting *Hymes*, 408 F. Supp. 3d at 196).

As it did in *Lusnak*, the OCC filed an amicus brief supporting the bank and arguing that the state law was preempted under *Barnett Bank*. Br. of Amicus Curiae Office of the Comptroller of the Currency, *Cantero v. Bank of America, N.A.*, No. 21-400, 2021 WL 2477066, at *7 (June 15, 2021) (2021 OCC Amicus). The OCC reiterated that "a state law that requires a national bank to pay even a nominal rate of interest on a particular category of account impermissibly conflicts with a national bank's power." *Id.* at *9.

The Second Circuit agreed. The court explained that the district court had erred when it "read 'significantly interfere' to mean 'practical[ly] abrogat[e]" and "looked to the 'impact' and 'degree of interference' to determine" preemption under *Barnett Bank* and Dodd-Frank. *Cantero*, 2022 WL 4241359, at *6. The correct question, the court of appeals explained, is "not how much a state law impacts a national bank, but rather whether it purports to 'control' the exercise of its powers." *Id.* The court observed that national

banks are empowered by federal law "to create and fund escrow accounts." *Id.* at *9. "By requiring a bank to pay its customers in order to exercise a banking power granted by the federal government," the New York law would impermissibly "exert control over banks' exercise of that power." *Id.*

The Second Circuit further reasoned that no aspect of Dodd-Frank saved the New York law from preemption. The amendments in 12 U.S.C. § 25b(b)(1)(B), the court explained, merely "codifie[d]" the longstanding preemption standard set forth in *Barnett Bank*. *Cantero*, 2022 WL 4241359, at *10. The court thus reasoned that Section 25b(b)(1)(B)'s reference to state laws that "significantly interfere" with the exercise of a national bank's powers encompassed—like *Barnett Bank*'s same language—any state law that attempted to "usurp[] control" over a federal power, rather than only laws that imposed a "high 'degree'" of interference. *Id.* at *11.

As for TILA's Section 1639d, it did not apply to the plaintiffs' loans, and the Second Circuit therefore found it irrelevant to the preemption analysis. The court explained that, although "the district court, like the Ninth Circuit in *Lusnak*, [had] concluded that [Section 1639d] somehow reflected Congress's judgment that all escrow accounts . . . must be subject to state laws," that reasoning "is incorrect." *Cantero*, 2022 WL 4241359, at *12. "To the contrary," the court reasoned, Section 1639d's enumeration of *some* mortgage escrow accounts on which banks must pay interest is best read to "impl[y] the exclusion of others" from that requirement. *Id.*

The Second Circuit's decision directly repudiates the Ninth Circuit's reasoning in *Lusnak* as applied by the panel in this case. The Second Circuit emphasized that the district court's analysis there had "closely tracked" that of *Lusnak* and repeatedly rejected that reasoning. *Cantero*, 2022 WL 4241359, at *5; *see id.* at *8, *11, *12 (citing and disagreeing with *Lusnak*). And there is no question that the Second Circuit, applying its decision in *Cantero*, would find that California Civil Code § 2954.8(a) is preempted as to respondents' loans, to which Section 1639d(g)(3) does not apply. *See Cantero*, 2022 WL 4241359, at *12 n.11 (reserving the question whether N.Y. GOL 5-601 would be preempted as applied to escrow accounts mandated by Section 1639d). Circuit conflicts are rarely as clean and clear as this one.

B. The Ninth Circuit's Approach Conflicts with Decisions from the First, Sixth, and Eighth Circuits.

Beyond the acknowledged conflict with the Second Circuit, the Ninth Circuit's decisions in *Lusnak* and this case also conflict with the approach of several other circuits considering NBA preemption of similar state laws. In contrast to the Ninth Circuit's approach in *Lusnak*, those decisions have declined to determine preemption under the NBA based on the degree to which a state law impairs a national bank's exercise of a federal power. Instead, like the Second Circuit, other circuits ask only whether a state law directed at national banks' attempts to control or condition the exercise of the banks' power on compliance with state

law requirements—an approach that, at least one district court decision outside the Second Circuit has also recognized, dooms state interest-on-escrows laws.

In *Monroe Retail, Inc. v. RBS Citizens, N.A.*, 589 F.3d 274 (6th Cir. 2009), for example, the Sixth Circuit held that an Ohio law was preempted by the National Bank Act to the extent it prohibited a national bank from exacting fees for processing a state garnishment order before paying the garnishor. *Id.* at 283. The court reasoned that the law would "significantly interfere" with a national bank's federal power to "charge fees." *Id.* It rejected any suggestion that to significantly interfere with a federal banking power, a state law must "effectively thwart" its exercise. *Id.* (quoting *Ass'n of Banks in Ins., Inc. v. Duryee*, 270 F.3d 397, 409 (6th Cir. 2001)). And the court found the state law "unduly burdensome" with no inquiry into whether the state requirement was unreasonable or punitive. *Id.* at 284. Instead, the law was preempted because it "mandate[d]" the way in which national banks could "carry out their daily account-balancing and account-management functions." *Id.*

Likewise, in *Bank One, Utah, N.A. v. Guttau*, 190 F.3d 844 (8th Cir. 1999), the Eighth Circuit found an Iowa law prohibiting advertisements on ATMs to be preempted, without asking the degree to which the law would impact a bank's ability to operate. *Id.* at 850. The court reasoned simply that the federal power to operate ATMs cannot be "construed so narrowly as to preclude the use of advertising" on those machines. *Id.* at 850 (quoting *Franklin Nat'l Bank v. New York*, 347 U.S. 373, 377 (1954)). "Congress ha[d] made clear

in the NBA its intent that ATMs are not to be subject to state regulation, and thus the provisions of the Iowa [law] that would prevent or significantly interfere with Bank One's placement and operation of its ATMs must be held to be preempted." *Id.*

And in *SPGGC, LLC v. Ayotte*, 488 F.3d 525 (1st Cir. 2007), the First Circuit found that a New Hampshire law prohibiting the sale of giftcards with expiration dates was preempted as applied to giftcards issued by national banks. *Id.* at 527. The court held that the state law could not be applied even to non-bank third parties selling bank-issued cards because doing so would impermissibly "limit[]" the national bank's federal authority to issue giftcards. *Id.* at 531, 533.

This reasoning applies directly to the kind of state interest on escrow laws at issue here: the District of Rhode Island recently recognized that, under *SPGGC,* Rhode Island's interest-on-escrow law was preempted as to national banks. *See Conti v. Citizens Bank, N.A.*, No. 21-cv-296, 2022 WL 4535251, at *4 (D.R.I. Sept. 28, 2022). The court explained that such a law, "like the New Hampshire law in *SPGGC*, places 'limits' on [the] incidental power . . . to establish escrow accounts," and "therefore 'significantly interfere[s]'" with that power. *Id.*

C. The Ninth Circuit's Approach Also Conflicts with the California Supreme Court's Approach.

Finally, closest to home, the California Supreme Court has determined that a California banking regulation, like the one here, was preempted by the NBA under reasoning that is directly contrary to the Ninth Circuit's approach.

In *Parks v. MBNA America Bank, N.A.*, 54 Cal. 4th 376 (Cal. 2012), the California high court held that California could not require national banks to include certain disclosures on convenience checks issued to the bank's credit-card holders. *Id.* at 380. The California Court of Appeal had applied reasoning remarkably similar to *Lusnak*'s. It had acknowledged that the California disclosure requirement imposed "*some* burden" on a national bank's exercise of its authority to offer credit. *Id.* at 381 (citation omitted). But, like the Ninth Circuit, the court had declined to find preemption without a showing that the law effectively forbade or "significantly impair[ed]" by some undefined degree the exercise of that authority. *Parks v. MBNA America Bank, N.A.*, 109 Cal. Rptr. 3d 248, 257 (Cal. Ct. App. 2010); *see id.* (declining to "elucidate a precise 'yardstick for measuring'" preemptive interference) (citation omitted).

The California Supreme Court rejected that approach. Looking to this Court's decisions in *Barnett Bank* and *Franklin National Bank*, the court found it sufficient for preemption that the California disclosure requirement tried to impose a condition on the

national bank's exercise of its federal power to offer credit in the form of convenience checks. "[A]s in *Barnett Bank*," the court explained, "the federal statute does not grant national banks a 'limited permission to [loan money on personal security] to the extent that state law also grants permission to do so." *Parks*, 54 Cal. 4th at 387 (citation and emphasis omitted). "Instead, federal law authorizes national banks to loan money on personal security with 'no "indication" that Congress intended to subject that power to local restriction.'" *Id.* (citation omitted). Even though the California law did not purport to "outlaw a category of banking activity," it was enough that it attempted to "forbid national banks from offering credit in the form of convenience checks *unless they comply with state law*." *Id.* at 387-88.

California Civil Code § 2954.8(a) operates in precisely the same manner, prohibiting national banks from offering mortgage escrow accounts unless they comply with the state law requirement to pay a minimum 2% interest rate. Had respondents pursued their California-law claims in a California court, that court would have been compelled by *Parks* to find California Civil Code § 2954.8(a) preempted. And yet the Ninth Circuit has now repeatedly declined to reach the same conclusion. Such a conflict between a state high court and the federal circuit in which the State is located about the validity of that State's laws is untenable.

II. The National Bank Act Preempts State Interest-on-Escrow Laws.

This Court's review is also needed to correct the Ninth Circuit's erroneous view of preemption under the NBA. Under principles of preemption in the national banking context, which Congress codified in 12 U.S.C. § 25b(b)(1)(B), California Civil Code § 2954.8(a) impermissibly restricts Flagstar's exercise of its powers to make real estate loans and maintain mortgage escrow accounts. The Ninth Circuit's contrary rulings in *Lusnak* and in the decision below are incorrect.

A. The National Bank Act Preempts State Laws that Attempt To Control the Exercise of a National Bank's Federal Powers.

Section 25b(b)(1)(B) expressly preempts any "[s]tate consumer financial law" that, "in accordance with the legal standard for preemption" articulated in *Barnett Bank*, "prevents or significantly interferes with the exercise by the national bank of its powers." 12 U.S.C. § 25b(b)(1)(B). *Barnett Bank* and the decisions on which it relies, in turn, demonstrate that, when Congress grants national banks a broad power without expressly subjecting that power to state limitations, state laws purporting to control or limit the exercise of that power are preempted.

In *Franklin National Bank of Franklin Square v. New York*, 347 U.S. 373 (1954), the Court held that the Federal Reserve Act's authorization "that a national bank may . . . receive time and savings deposits," along with the NBA's grant of authority to "receive deposits," preempted a New York law prohibiting national

banks from using the word "savings" in their advertising and operations. *Id.* at 376, 378-79. The Court observed that the federal powers were granted "without qualification or limitation." *Id.* at 376; *see id.* at 377. And absent such limitation, the Court declined to construe them as "subject to local restrictions." *Id.* at 377-78. Advertising one's business, the Court noted, was among the "most usual and useful" weapons in the "competition for business." *Id.* at 377. New York's law restricting a national bank's authority to advertise using a common term for the bank's federally authorized service presented "a clear conflict" with federal law and thus had to "give way to the contrary federal policy." *Id.* at 378-79.

Barnett Bank presented a "quite similar" case. 517 U.S. at 33. There, the NBA provided that certain national banks "'may' sell insurance in small towns." *Id.* at 28. But a Florida law permitted only unaffiliated small town banks to sell most kinds of insurance, excluding national banks from doing so. *Id.* at 28-29. The Court held that Florida's law was preempted as applied to national banks. *Id.* at 37.

The Court explained that in "defining the pre-emptive scope of statutes and regulations granting a power to national banks," its precedents "take the view that normally Congress would not want States to forbid, or to impair significantly, the exercise of a power that Congress explicitly granted." *Barnett Bank*, 517 U.S. at 33. Citing *Franklin National Bank*, the Court explained that "where Congress has not expressly conditioned the grant of 'power' upon a grant of state permission," the Court has "ordinarily found

that no such condition applies." *Barnett Bank*, 517 U.S. at 34. Because the federal grant of authority to sell insurance "contain[ed] no 'indication' that Congress intended to subject that power to local restriction," the Court concluded it was not subject to such restrictions. *Id.* at 34-35. Federal law permitted national banks to sell insurance, "whether or not a State grants its own state banks or national banks similar approval." *Id.* at 37.

B. State Laws Requiring Paying Interest on Escrow Accounts Attempt To Control the Exercise of a National Bank's Federal Powers.

State interest-on-escrow laws, as applied to national banks, are preempted under Section 25b(b)(1)(B)'s codification of the *Barnett Bank* preemption standard.

The NBA grants national banks the power to "make, arrange, purchase or sell" real estate loans, along with the incidental powers necessary to perform that express power. 12 U.S.C. § 371(a); *see* 12 U.S.C. § 1464(c)(1) (granting federal savings banks power over real estate lending). And the OCC has long maintained that the power to establish and maintain associated escrow accounts is incidental to the power to make those loans. *See, e.g.*, OCC Interp. Ltr. 1041, 2005 WL 3629258, at *2 (Sept. 28, 2005) ("OCC has approved national banks providing escrow services in the context of collecting real estate taxes."); OCC, Conditional Approval No. 276, 1998 WL 363812, at *9

(May 8, 1998) ("National banks have long been permitted to service the loans that they make and servicing frequently entails the assurance that local real estate taxes are paid on time, particularly when such loans involve tax and insurance escrow accounts."); 2021 OCC Amicus at *2 ("[N]ational banks have the implied authority to provide, establish, and service escrow accounts."); 2018 OCC Amicus at *2-3 ("[T]he statutory authority for national banks' real estate lending powers . . . include[s] requiring, establishing, and maintaining escrow accounts."); *see also NationsBank*, 513 U.S. at 258 n.2 (recognizing the OCC's "discretion" to articulate incidental powers "within reasonable bounds").

Nothing in the federal grant of authority to engage in real estate lending conditions that power on state permission. Nor does anything in the federal framework regulating the power to service escrow accounts expressly condition the power's exercise on state permission. Instead, those *federal* powers are granted subject only to *federal* restrictions. *See* 12 U.S.C. § 371(a) ("Any national banking association may make, arrange, purchase or sell [mortgage] loans . . . subject to [12 U.S.C. § 1828(o)] and such restrictions and requirements as the Comptroller of the Currency may prescribe by regulation or order."); 12 U.S.C. § 1464(c)(1) ("To the extent specified in regulations of the Comptroller, a Federal savings association may invest in, sell, or otherwise deal in [real estate] loans."); 12 C.F.R. § 34.4(a) ("A national bank may make real estate loans . . . , without regard to state law limitations concerning . . . [e]scrow accounts.").

Because the federal grants of power to national banks contain "no 'indication' that Congress intended to subject th[ose] power[s] to local restriction," under *Barnett Bank* and this Court's related precedents, state laws purporting to directly control or limit a national bank's exercise of those powers are preempted. By requiring banks to pay minimum 2% interest on escrow funds, California Civil Code § 2954.8(a) attempts to directly control national banks' exercise of their enumerated power to perform real estate lending and their incidental power to operate escrow accounts. Thus, as the OCC has explained, "a proper application of *Barnett [Bank]* should have resulted in . . . preemption of the California escrow statute." 2018 OCC Amicus at *9; *accord* 2021 OCC Amicus at *6 ("A conclusion that state laws . . . are not preempted unless they practically abrogate or nullify a national bank's exercise of a federal banking power is inconsistent with *Barnett [Bank]*.") (brackets and citation omitted). California Civil Code § 2954.8(a) "significantly interferes with the exercise by [those] national bank[s] of [their] power," 12 U.S.C. § 25b(b)(1)(B), and is therefore preempted.

C. The Ninth Circuit's Contrary Conclusion Is Wrong.

The Ninth Circuit reached the opposite conclusion in *Lusnak* based on its determinations (1) that Section 1639d(g)(3) reflects Congress's judgment that state interest-on-escrow laws will not, as a general matter, significantly interfere with the exercise of national banking powers, and (2) that direct intrusion by state

law on the exercise of national banking powers is permissible so long as the degree of intrusion is not "punitively high." App., *infra*, 94-95, 97 n.7. Both determinations are wrong.

1. First, the Ninth Circuit significantly overread TILA's Section 1639d(g)(3). That provision states simply that "*[i]f* prescribed by *applicable* State or Federal law," a creditor must pay interest as prescribed by that "applicable State or Federal law." 15 U.S.C. § 1639d(g)(3) (emphasis added). By its own terms, the statute recognizes that different laws apply to the different creditors to which the statute applies—a group that ranges from federally chartered banks to nonbank lenders governed by state law—and that those different legal schemes may, or may not, require particular lenders to pay interest on particular types of escrow accounts. The most straightforward reading of this provision is that Congress recognized that national banks would be subject to federal laws, which currently do not require paying interest on escrow, while other lenders would be subject to state laws that might.

Section 1639d(g)(3) says nothing about preemption of state interest-on-escrow laws. It plainly contains no *express* statement conditioning national banks' federally granted powers to extend real estate loans and service escrow accounts on state law restrictions. *See Barnett Bank*, 517 U.S. at 34 ("[W]here Congress has not expressly conditioned the grant of 'power' upon a grant of state permission, the Court has ordinarily found that no such condition applies."). And it is implausible that Congress subjected federally chartered

banks to state control "us[ing] a means so indirect," *United States v. Locke*, 529 U.S. 89, 106-07 (2000), as a conditional statement in an amendment to TILA. Congress knows how to directly address NBA preemption directly when it wants to. It did so in other parts of Dodd-Frank when it codified *Barnett Bank* and eliminated HOLA field preemption. *See* 12 U.S.C. § 25b. That Congress declined to speak directly about preemption in Section 1639d(g)(3) is a strong indication that it did not intend for that provision to subject national banking powers to local restriction.

In any event, even if Section 1639d could be read to speak to preemption, it would not support the Ninth Circuit's decision. At most, Section 1639d(g)(3) reflects Congress's intent to subject higher-priced federal mortgage loans to state interest-on-escrow requirements, but only those loans. *See* 15 U.S.C. § 1639d(f) (preserving the authority to set the terms of escrow accounts for non-covered mortgage escrow accounts). As the Second Circuit reasoned, "it is much more 'harmonious' to read the NBA together with Dodd-Frank as a decision by Congress to carve out an exception from its general rule [of preemption], rather than [as] expressly imposing a burden on some mortgage loans in order to impliedly impose a burden on all of them." *Cantero*, 2022 WL 4241359, at *12. Respondents have never asserted that their mortgages fit within any exception Section 1639d(g)(3) created.

2. Second, the Ninth Circuit also erred by refusing to find preemption unless a state law's impact on national banks rises to a particular measurable degree—for example, a "punitively high" level. App., *infra*, 97

n.7. The determination whether a state law "significantly interferes with the exercise of national banking powers" under *Barnett Bank* is a qualitative, not quantitative measure. "The issue is not whether this particular rate of 2% is so high that it undermines the use of [escrow] accounts"; it is whether a State is attempting to exercise a "power to control" over federal banking powers that Congress has not allowed. *Cantero*, 2022 WL 4241359, at *9.

The Ninth Circuit's contrary approach is unworkable. "If an interest rate of 2% were not significant interference, what rate would be sufficiently high?" *Cantero*, 2022 WL 4241359, at *9 n.8. The Ninth Circuit does not say, and nothing in this Court's precedents nor Section 25b(b)(1)(B) equips courts to make such determinations. Instead, this Court has repeatedly found any state law that attempts to directly limit a national bank's broadly granted powers to be a significant interference. *See, e.g.*, *Watters*, 550 U.S. at 14-15; *Barnett Bank*, 517 U.S. at 37; *Fidelity Fed. Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 154-55 (1982); *Franklin Nat'l Bank*, 347 U.S. at 378-79.

In any event, the Ninth Circuit is wrong to suggest that interest-on-escrow laws create only a "minor interference" with a national bank's exercise of its banking powers. App., *infra*, 94. In addition to the interest payments themselves, each such law imposes substantial administrative costs and complications on banking operations. *See Duryee*, 270 F.3d at 408-09 (holding that state-specific restrictions that would "inevitably impose administrative costs on national banks" would "significantly interfere[]" with the exercise of a

national bank power); *Cline v. Hawke*, 51 F. App'x 392, 397 (4th Cir. 2002) (holding that state restrictions that increased bank operating costs and affected national banks' ability to solicit and sell insurance products were preempted under *Barnett*).

The burden posed by the Ninth Circuit's approach to preemption cannot be considered only in isolation. If California may dictate the terms of federally authorized mortgage escrow accounts for California customers, other States presumably may do the same. The Ninth Circuit's approach thus threatens precisely the "diverse and duplicative superintendence of national banks' engagement in the business of banking" that "the NBA was designed to prevent." *Watters*, 550 U.S. at 13-14; *see First Nat'l Bank of San Jose v. California*, 262 U.S. 366, 370 (1923).

Eleven other States already have similar laws requiring banks to pay interest on funds held in mortgage escrow accounts.[2] These state laws set different requirements for when lenders must pay interest, how much they must pay, and even how that amount is determined. Oregon, for example, broadly requires any lender operating a mortgage escrow account to pay interest on deposited funds at a "discount rate" defined as "the auction average rate on 91-day United States Treasury bills . . . less 100 basis points." Or. Rev.

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[2] *See* Conn. Gen. Stat. § 49-2a; Me. Rev. Stat. Ann. tit. 33, § 504; Md. Code Ann. Com. Law § 12-109; Mass. Gen. Laws ch. 183, § 61; Minn. Stat. Ann. § 47.20 (subdv. 9); N.H. Rev. Stat. Ann. § 383-B:3-303(a)(7)(E); Or. Rev. Stat. §§ 86.205, 86.245; 19 R.I. Gen. Laws § 19-9-2; Utah Code Ann. § 7-17-1; Vt. Stat. Ann. tit. 8, § 10404; Wis. Stat. § 138.052.

Stat. §§ 86.205, 86.245. Minnesota requires interest payments only for certain types of mortgage escrow accounts but requires paying at least 3% interest annually. Minn. Stat. Ann. § 47.20 (subdv. 9(a)). Others may follow with other "varying limitations." *First Nat'l Bank of San Jose*, 262 U.S. at 370. Neither the NBA nor any other federal law should be read to "permit such results." *Id.*

Congress authorized national banks to exercise their real estate lending and escrow management powers free from "inconsistent or intrusive state regulation" that would "impair[] the national system" of banking the NBA creates. *Watters*, 550 U.S. at 11. California Civil Code § 2954.8(a) and laws like it threaten both the uniformity of the national banking system and the reach of the powers granted to the national banks operating within it. The Court's intervention is warranted to prevent that result.

III. The Question Presented Is Important and Recurring.

Both the meaning of this Court's NBA preemption standard in general and its specific application to state interest-on-escrow laws are important and recurring questions of federal law that warrant this Court's review. The Ninth Circuit's erroneous view of NBA preemption creates uncertainty and instability, not only for national banks operating in the twelve States with interest-on-escrow laws, but for the entire national banking system. The OCC, as the principal regulator of national banks, agrees. The agency has repeatedly (and recently) expressed its view that the

proper interpretation of *Barnett Bank*—particularly as it applies to interest-on-escrow laws—"is a matter of foundational consequence . . . to the federal banking system." 2021 OCC Amicus at *3.

Standing alone, the validity of state interest-on-escrow laws, applied to national banks, is itself an important question of federal law. Federally chartered banks use residential mortgage escrow accounts as a vital risk mitigation tool that "benefits both lending institutions and homeowners." U.S. General Accounting Office, *Study Of The Feasibility Of Escrow Accounts On Residential Mortgages Becoming Interest Bearing* at 5 (1973). The Ninth Circuit's decision threatens to disrupt this practice and undermine its benefits. As a matter of economic reality, conditioning a national bank's authority to offer a mortgage escrow account on a state law requirement to pay interest (often at rates exceeding what the bank typically pays on savings accounts) will have consequences for lenders and consumers.[3] Banks faced with that choice may restrict lending to riskier borrowers or do so only at higher interest rates or on more stringent terms.

This disruption will extend well beyond California—one of the country's largest real estate markets—

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[3] *See* Br. of Amici Curiae Bank Policy Institute et al., *Bank of America, N.A. v. Lusnak*, No. 18-212, 2018 WL 4464737, at *12 (Sept. 17, 2018) (noting that a 2% interest rate was "six times higher than the long-run average of .32% paid by FDIC-insured U.S. depository institutions on certificates of deposit[s]"); Fed. Deposit Ins. Corp., National Rate on Non-Jumbo Deposits (less than $100,000): 12 Month CD, *available at* https://fred.stlouisfed.org/series/CD12NRNJ.

and the Ninth Circuit. As noted, twelve States currently have an interest-on-escrow law on the books, and more may follow if *Lusnak* remains good law. *See* n. 2, *supra*. Under *Cantero*, the laws in New York, Connecticut, and Vermont are preempted as to national banks, but California's law remains intact, and the status of the others (and any future enactments) is uncertain. Federally chartered banks like Flagstar often operate in all 50 States. This patchwork of state laws and the uncertainty surrounding their validity will impede national banks' ability to efficiently structure their operations and policies related to real estate lending and escrow accounts—as well as their efforts to comply with the law. The NBA and this Court's preemption standard are meant to avoid exactly this kind of instability. This Court should intervene to provide clarity on the important question of *Barnett Bank*'s impact on laws like California Civil Code § 2954.8(a).

Beyond state interest-on-escrow laws, the court of appeals' erroneous view of *Barnett Bank* also opens the door to other forms of intrusive state regulation that will undermine the national banking system's uniformity and operations. If States were allowed to enact laws like California Civil Code § 2954.8(a) to limit national banks' exercise of their federally granted powers—subject only to an undefined restriction on "punitive" regulations—their ability to impose inconsistent and intrusive limitations on other national banking powers would be massively expanded.

Congress designed the NBA to protect national banks from the "hazard of unfriendly legislation by the States." *Tiffany v. Nat'l Bank. of Mo.*, 85 U.S. 409, 413 (1873). Congress also sought to shield national banks from disparate and conflicting state regulations of the kind that will result if the Ninth Circuit's view of *Barnett Bank* stands. *Watters*, 550 U.S. at 11. The correct interpretation of *Barnett Bank* plays a critical role in effecting Congress's vision of an independent, uniform national banking system. This Court's intervention is needed to restore and ensure that uniform approach, and to avoid the damaging uncertainty that will otherwise persist.

IV. This Case Is an Ideal Vehicle To Resolve the Question Presented.

This case presents an ideal vehicle for resolving the question presented and the scope of National Bank Act preemption of state interest-on-escrow laws. The court of appeals' affirmance of the district court rests exclusively on the Ninth Circuit's view that "the NBA does not preempt California Civil Code § 2954.8(a)" with respect to any national bank. App., *infra*, 3 (quoting *Lusnak*, 883 F.3d at 1197). The preemptive scope of the National Bank Act, as interpreted in *Barnett Bank* and codified in 12 U.S.C. § 25b(b)(1)(B), would thus be the only issue before this Court and the only grounds on which to affirm or reverse the court of appeals' decision.

The court of appeals' limited remand for a minor correction of the judgment provides no obstacle to the Court's resolution of that question nor reason to delay

review. The agreed-to remand under 28 U.S.C. § 2106 left only the ministerial task of "modify[ing] the judgment amount from $9,262,769.24 to $9,180,580.15" and adjusting the class definition date by five months. App., *infra*, 5. The district court so modified the final judgment in June. *See* Dkt. 227. And no party has appealed the modified judgment. Thus, the court of appeals' decision is not interlocutory in any sense relevant to this Court's review. Even if it were, this Court "has unquestioned jurisdiction to review interlocutory judgments of federal courts of appeals." Stephen M. Shapiro et al., Supreme Court Practice § 4.18, at 282 (10th ed. 2013).

Finally, the panel's affirmance of the unqualified nature of *Lusnak*'s preemption holding and the Ninth Circuit's subsequent denial of Flagstar's petition for rehearing en banc make clear that the Ninth Circuit has no intention of revisiting its *Lusnak* decision to bring it into accord with the reasoning of its sister circuits. *See also* App., *infra*, 5 (refusing to reconsider or narrow *Lusnak* because "neither the Supreme Court nor the Ninth Circuit sitting en banc has heard a case that could bring *Lusnak*'s holding into question"). Only this Court's intervention can resolve the conflict.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

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